STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS ON LEAVE GRANTED

JOANNE ROWLAND, a/k/a
JOAN ROWLAND,

Plaintiff/Appellee,

Supreme Court No. 130379
Court of Appeals No. 253210
Washtenaw Circuit Court No. 03-000128-NO

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant/Appellant.

/

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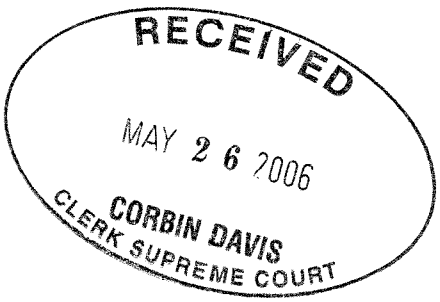
MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY'S AMICUS CURIAE BRIEF



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STATEMENT OF BASIS OF JURISDICTION

On December 17, 2003, the Honorable David S. Swartz of the Washtenaw County Circuit Court denied Defendant Washtenaw County Road Commission's Motion for Summary Disposition. On January 6, 2004, Defendant Road Commission timely filed its Claim of Appeal in the Michigan Court of Appeals. That appeal was by right pursuant to MCR 7.202(7)(a)(v) (now MCR 7.202(6)(a)(v)), as it was an order denying governmental immunity to a governmental agency.

On December 13, 2005, the Court of Appeals issued its Per Curiam Opinion in this matter, holding that it was constrained by precedent to rule in favor of the Plaintiff/Appellee. Defendant/Appellant then filed a timely Application for Leave to Appeal, which this Court granted by Order dated March 31, 2006. This Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2) and 7.302.

STATEMENT OF QUESTIONS ADDRESSED BY MMRMA AMICUS CURIAE

I. **DOES STARE DECISIS STAND AS A BARRIER TO OVERRULING *HOBBS* AND *BROWN*?**

Plaintiff/Appellee answers:	yes
Defendant/Appellant answers:	no
The Court of Appeals was constrained to answer:	yes
Amicus Curiae answers:	no

II. **SHOULD A DECISION OVERRULING *HOBBS* AND *BROWN* BE GIVEN RETROACTIVE EFFECT?**

Plaintiff/Appellee answers:	no
Defendant/Appellant answers:	yes
The Court of Appeals did not answer	
Amicus Curiae answers:	yes

INTRODUCTION

The primary issue in this case is whether an "actual prejudice" requirement should continue to be engrafted onto the notice provision at MCL 691.1404(1) where that statute is entirely devoid of any such "actual prejudice" language. Amicus curiae submits that where a claimant under the highway exception to governmental immunity fails to timely or adequately comply with the notice requirement at MCL 691.1404, the governmental agency should not be required to show that it suffered "actual prejudice" as a result of the claimant's faulty notice where the statute imposes no such showing.

By Order dated March 31, 2006, this Court granted leave to appeal to Defendant/Appellant, the Washtenaw County Road Commission (hereinafter "Appellant" or "Road Commission"). The Court ordered that the parties shall include among the issues to be addressed: 1) whether the Road Commission's proposed overruling of **Hobbs v Michigan State Highway Dep't**, 398 Mich 90, 96; 247 NW2d 754 (1976) and **Brown v Manistee Co. Rd. Comm.**, 452 Mich 354, 356-357; 550 NW2d 215 (1996), which imposed a showing of actual prejudice onto MCL 691.1404, is justified under principles of stare decisis as discussed in **Robinson v City of Detroit**, 462 Mich 439, 463-468; 613 NW2d 307 (2000); and 2) if so, whether a decision overruling **Hobbs** and **Brown** should have retroactive or prospective application under the standard set forth in **Pohutski v City of Allen Park**, 465 Mich 675, 695-699; 641 NW2d 219 (2002). (**Exhibit 1**, Order dated March 21, 2006.)

Amicus curiae, the Michigan Municipal Risk Management Authority (MMRMA), is a pool of 338 self-insured municipalities and governmental agencies throughout the State of Michigan. More specifically, the MMRMA consists of 67 cities, 60 counties, 38 townships, 10 villages, and 163 other governmental entities. The MMRMA supports the Appellant's position in this matter and

offers a state-wide perspective. The MMRMA submits its proposed amicus curiae brief because its members have a direct and substantial interest in the construction of the notice provision at MCL 691.1404. Where the Legislature clearly and unambiguously chose not to require a showing of actual prejudice when a claimant fails to provide notice pursuant to the statute, this Court should not judicially create such a requirement. Prior cases imposing an "actual prejudice" finding should be overruled and this decision should be given retroactive application.

STATEMENT OF FACTS

The facts of the underlying case are more elaborately set forth in Defendant/Appellant's Brief, and the MMRMA concurs in that factual recitation. Succinctly put, this case was brought pursuant to MCL 691.1402, commonly known as the "defective highway exception" to governmental immunity. The primary issue here involves construction of the notice provision required by MCL 691.1404(1), which explicitly states in pertinent part:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.[1]

Indisputably, Plaintiff failed to provide timely notice pursuant to the statute. Plaintiff's counsel forwarded a retention letter to Defendant/Appellant 140 days after the injury allegedly occurred. Appellant also maintains that the retention letter was inadequate in that it failed to specify the exact location and nature of the defect, having advised merely that an "incident" occurred "at the

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[1]Subsection (3) pertains to a person under the age of 18 or one who is physically or mentally disabled, and is inapplicable here.

intersection of Jennings and Main Street in Northfield Township." The notice, such as it was, did not identify a defect at all, much less specify the exact location of a defect.

The trial court denied the Road Commission's Motion for Summary Disposition and the Court of Appeals reluctantly affirmed. The Court of Appeals held that Supreme Court precedent, by way of **Hobbs**, supra at 96, and **Brown**, supra at 356-357, required the Road Commission to show that it suffered "actual prejudice" as a result of the untimely or inadequate notice. Absent such a showing, the appellate court held that it was "duty bound" to follow the **Hobbs** and **Brown** Supreme Court precedent. (**Exhibit 2**, **Rowland v Washtenaw Co. Rd. Comm.**, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2005 (Docket No. 253210).) Judge Kirsten Frank Kelly filed a separate concurring opinion in the Court of Appeals, emphasizing that she agreed with the Appellant that summary disposition should have been granted because Plaintiff failed to provide timely or adequate notice of her claim, as required by the plain language of the statute. However, she too felt hamstrung by prior decisions of a superior court. Judge Kelly observed along with the majority that a showing of actual prejudice, resulting from noncompliance with the notice provision at MCL 691.1404, was judicially mandated by prior Supreme Court precedent.

The Road Commission subsequently filed an Application for Leave to Appeal to this Honorable Court. Leave was granted by Order of March 31, 2006, as set forth above. The MMRMA respectfully submits that prior cases - which judicially engraft an "actual prejudice" requirement onto MCL 691.1404 - should be overruled and, further, that this decision should have retroactive application.

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo on appeal. **Pohutski**, supra at 681.

ARGUMENT

I. STARE DECISIS DOES NOT STAND AS A BARRIER TO OVERRULING *HOBBS* AND *BROWN*.

A. The Purpose of Governmental Immunity and the Framework for Analysis

In **Nawrocki v Macomb County Road Commission**, 463 Mich 143; 615 NW2d 702 (2000), this Court elaborated on the foundation for governmental immunity. "Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency." Id., citing **Ross v Consumers Power Co. (On Rehearing)**, 420 Mich 567, 621; 363 NW2d 641 (1984). This Court observed that immunity from tort liability "is expressed in the broadest possible language--it extends immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." **Nawrocki**, at 156, emphasis in original. This Court recognized that "the Legislature's refusal to abolish completely governmental immunity, evidences a clear legislative judgment that *public and private tortfeasors are to be treated differently*." Id., emphasis added.

Quoting from the landmark **Ross** case, the **Nawrocki** Court highlighted the differences between governmental entities and private tortfeasors:

> Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity cannot often reduce its risk of potential liability by refusing to engage in a particular activity, for

> government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision-making has been allocated among three branches of government--legislative, executive and judicial--and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions. **Nawrocki**, at 156-157, quoting **Ross**, at 618-619.

Taxpayers, as a whole, fund governmental activities and inevitably pay for liabilities resulting from them. Given the obligations imposed upon government agencies and the underpinnings of governmental immunity, our Legislature chose to limit liabilities arising from governmental functions. This Court has acknowledged the obvious corollary to immunity: "because immunity necessarily implies that a 'wrong' has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied." **Nawrocki**, at 157.

Our Legislature promulgated an expansive governmental immunity doctrine with clearly-delineated statutory exceptions. This Court has repeatedly emphasized that "there is one basic principle" that guides decisions involving governmental immunity: "the immunity conferred upon governmental agencies is *broad,* and the statutory exceptions thereto are to be *narrowly* construed." **Nawrocki**, at 158, numerous citations omitted, emphasis in original.[2]

B. Judicial Creation of the "Actual Prejudice" Requirement

In **Reich v State Hwy. Dep't**, 386 Mich 617; 194 NW2d 700 (1972), the Court struck down a 60-day notice requirement as being violative of equal protection, reasoning that it arbitrarily

[2]There are six statutory exceptions to governmental immunity: the highway exception, MCL 691.1402, the motor vehicle exception, MCL 691.1405, the public building exception, MCL 691.1406, the proprietary function exception, MCL 691.1413, the governmental hospital exception, MCL 691.1407(4), and the sewage disposal event exception, MCL 691.1416.

divided victims of negligent tortfeasors between those who suffered from governmental negligence who were required to give notice and those who suffered from private negligence who were not required to give notice. Subsequently, in **Carver v McKernan**, 390 Mich 96; 211 NW2d 24 (1973), the Court retreated from this position and upheld the constitutionality of notice provisions where the government could demonstrate prejudice as a result of the claimant's failure to give notice. Later, in **Hobbs**, supra, the Court upheld **Carver** and found that a showing of prejudice to the government was required on constitutional grounds:

> Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in M.C.L. §691.1404; MSA 3.996(104) is not a bar to claims filed pursuant to M.C.L. §691.1402; MSA 3.996(102).

In **Brown**, supra, the Court revisited the issue in the context of competing notice provisions. The Court concluded that the 120-day notice requirement in MCL 691.1404 was reasonable and prevailed over a shorter period in another statute. It reaffirmed **Hobbs** and the "actual prejudice" requirement, holding that the Court should remain faithful to precedent and noting that the Legislature had acquiesced in the **Hobbs** decision in the years following its issuance. Justice Riley dissented in **Brown**, joined by Justice Boyle.

C. *Hobbs* and *Brown* should be Overruled, and Stare Decisis does not bar such a decision

"Stare decisis" means "to abide by, or adhere to, decided cases." **Robinson**, supra at 463, n20, quoting Black's Law Dictionary (rev 4th ed.), p. 1577. Although stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived

integrity of the judicial process," it is "not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." Id., citing **Hohn v United States**, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998); **Holder v Hall**, 512 US 874, 944; 114 S Ct 2581; 129 L Ed 2d 687 (1994). This Court has repeatedly declared that it "will not close its eyes to a possible error it may have committed in the past," opining further that it "has no obligation to perpetuate error simply because it may have reached a wrong result in one of its earlier decisions. Thus, the doctrine of stare decisis does not tie the law to past, wrongly decided cases solely in the interest of stability and continuity." **Robinson**, supra at 463, n22; **Wilson v Doehler-Jarvis**, 358 Mich 510, 514; 100 NW2d 226 (1960). Stare decisis has been recognized as "a principle of policy, not an inexorable command." **Robinson**, supra at 464; **Pohutski**, supra at 694.

This Court has identified four factors to consider before overruling a prior decision: 1) whether the earlier case was wrongly decided, 2) whether the decision defies "practical workability," 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision. **Pohutski**, supra at 694. In **Robinson**, this Court overruled precedent concerning interpretation of the governmental immunity statute found at MCL 691.1407. It decided that "*the* proximate cause" did not mean "*a* proximate cause" and, thus, applied the statute as written. By parity of reasoning, the statute in this case should be applied as written, without the judicial gloss of "actual prejudice" engrafted upon the notice provision.

1. Applying the four factors

Hobbs and **Brown** were wrongly decided. MCL 691.1404(1) plainly states:

> As a condition to any recovery for injuries sustained by reason of any

> defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The statute is entirely devoid of the requirement that a governmental agency show "actual prejudice" as a result of untimely or improper notice. The imposition of an "actual prejudice" requirement is wholly judicially created and flies in the face of proper statutory construction.

The primary goal of statutory interpretation is "to discern and give effect to the Legislature's intent as expressed in the words of the statute." **DiBenedetto v West Shore Hosp.**, 461 Mich 394, 402; 605 NW2d 300 (2000). Words of a statute are accorded their plain and ordinary meaning, and courts look outside the statute to ascertain legislative intent *only if* the statutory language is ambiguous. **Pohutski**, at 683. Where the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed. Id.; **DiBenedetto**, at 402. "[N]o further judicial construction is required or permitted, and the statute must be enforced as written." Id.

It is fundamental that "courts may not rewrite the plain language of [a] statute and substitute their own policy decisions for those already made by the Legislature." **DiBenedetto**, at 405. Nor may courts speculate about an unstated purpose or the probable intent of the Legislature beyond the language used in the statute. **Pohutski**, at 683; **Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd.**, 240 Mich App 153, 173; 610 NW2d 613 (2000).

In this case, the statutory language at issue is unambiguous. As a precondition to any recovery, MCL 691.1404(1) requires a claimant under the highway exception to serve notice on the governmental entity "within 120 days from the time the injury occurred" specifying "the exact

location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." This statutory provision could not have been written any clearer. Further, nowhere in the statute is a showing of actual prejudice by the governmental entity even mentioned, much less required. The Legislature could have easily included such a requirement had it intended to do so. Language omitted from a statute is presumed to have been done so intentionally. **People v Wilson**, 257 Mich App 337, 345; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018 (2004); **Westfall v McCririe**, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 265386), **Exhibit 3**. It is not within the province of our courts to rewrite the plain language of this statute and substitute their own policy decisions for those of the Legislature. **DiBenedetto**, supra at 405. The statute is clear and unambiguous, and it must be enforced as written. No further judicial construction is required or permitted.

The **Hobbs** Court concluded that "actual prejudice" to the government due to lack of notice was the only legitimate purpose for the notice provision at MCL 691.1404(1). Therefore, actual prejudice must be shown by the government or lack of notice is not a bar to recovery. The **Hobbs** Court erred in deciding as much, and the majority in **Brown** erred by following in step. Justice Riley, in her dissent in **Brown**, squarely addressed the above expressed concern, which was premised upon constitutional grounds, and properly rejected it:

> This "constitutional" requirement engrafted by the Court is illusory. I note that "[w]hen scrutinizing economic and social legislation, this Court applies the rational basis standard of review."*Downriver Plaza Group v Southgate,* 444 Mich. 656, 666, 513 N.W.2d 807 (1994). The only inquiry, then, is whether this social legislation creating a 120-day notice requirement has a rational basis.
>
> This particular legislation passes the minimal rational basis test, and the Court in *Hobbs* was without authority to require a showing of

> prejudice in each and every case. Notice provisions rationally and reasonably provide the state with the opportunity to investigate and evaluate a claim. The mere fact that in some cases the legislation prevents prejudice to the government by itself is a rational basis. No further "constitutional" analysis is permitted. **Certainly, if the Legislature may provide no recovery at all, it may place a condition on recovery, i.e., a *reasonable* notice provision.** The Court in *Carver* and *Hobbs* erred in that both failed to properly analyze this social legislation under the rational basis standard. Erroneously concluding that prejudice had to be shown in every case to preserve the legislation's constitutionality, the Court ignored the rational basis test and created the prejudice requirement.
>
> The statute clearly survives rational basis scrutiny and, *is* constitutional. The statute, therefore, *must* be read and applied as written. In contrast, this Court in *Hobbs* created a condition for the application of a notice requirement that is not supported by the language of the statute. *Hobbs* is, therefore, in clear derogation of the fundamental precepts of statutory construction. I am unable to agree with this judicial intrusion into a legislative function. **Brown**, supra at 370-372, bold emphasis added, other emphasis in original, footnotes omitted.

The majority in **Brown** also relied on legislative acquiescence in reaffirming **Hobbs**. The Court observed that the Legislature has been silent since the **Hobbs** ruling requiring a showing of "actual prejudice," thereby suggesting that the Legislature agreed with the **Hobbs** decision. Justice Riley again vitiated this basis as a justification for upholding **Hobbs**:

> This argument is wholly without merit. In *Hobbs,* the Court upheld the constitutionality of the 120-day notice provision provided that prejudice be read into the statute. To overcome the previously adjudged constitutional infirmities of notice requirements, the *Hobbs* Court simply held, albeit improperly, that actual prejudice to the state was the only legitimate purpose for the notice provision. Accordingly, the Court held that the requirement of prejudice saved the statute from constitutional infirmity. The Legislature, therefore, was without authority during the past twenty years to eliminate the prejudice requirement which the *Hobbs* Court engrafted upon the statute. The dissent's legislative acquiescence argument ignores the fundamental principle that "[c]onstruction of the constitution is the province of the

> courts and this Court's construction of a State constitutional provision is binding on all departments of government, including the legislature." *Richardson v Secretary of State,* 381 Mich. 304, 309, 160 N.W.2d 883 (1968). Accordingly, principles of legislative acquiescence are not relevant to this case. **Brown**, supra at 372-373, footnotes omitted.

As such, **Hobbs** sent a message to the Legislature, albeit incorrectly, that the only way the notice provision would be constitutionally sound was if the government was actually prejudiced by the lack of notice. Subsequent "legislative acquiescence" does not amount to approval of **Hobbs**. The Legislature's silence can just as easily be ascribed as reluctance to act for fear that such action would be struck down as unconstitutional.

Further, in **Robinson**, supra, this Court cautioned against placing emphasis on "legislative acquiescence":

> We reject the dissent's argument that *Fiser* should not be overruled because of legislative acquiescence. As we recently explained in *Donajkowski v Alpena Power Co.,* 460 Mich. 243, 261, 596 N.W.2d 574 (1999):
>
> If it has not been clear in our previous decisions, we wish to make it clear now: "legislative acquiescence" is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence.
>
> See further *Van Dorpel v Haven-Busch Co.,* 350 Mich. 135, 146, 85 N.W.2d 97 (1957) (Voelker, J.):
>
> Now this beguiling doctrine of legislative assent by silence possesses a certain undeniable logic and charm. Nor are we oblivious to the flattery implicit therein; double flattery, in fact: flattery both to the profound learning and wisdom of the particular supreme court which has spoken, and flattery to a presumably alert and eagerly responsive State legislature. One pictures the legislators of our various States periodically clamoring and elbowing each other in their zeal to get at the pearls of wisdom embalmed in the latest decisions and advance

> sheets of their respective supreme courts--and thenceforth indicating their unbounded approval by a vast and permanent silence.
>
> Yet there are several dark shadows in this picture. For one, it suggests a legislative passion for reading and heeding the decisions of our supreme courts which we suspect may be scarcely borne out by the facts. For another, pushed too far such a doctrine suggests the interesting proposition that it is the legislatures which have now become the ultimate courts of last resort in our various States; that if they delay long enough to correct our errors those errors thus become both respectable and immutably frozen; and, finally, the larger and more dismal corollary that if enough people persist long enough in ignoring an injustice it thereby becomes just. Id., at 466, n25.

Based upon elemental principles of statutory construction, MCL 691.1404(1) contains no "actual prejudice" requirement and one should not be judicially read into the statute. **Hobbs** and **Brown** were wrongly decided, and claims of constitutional infirmities and legislative acquiescence do not alter that conclusion.

Prior decisions have proven to defy "practical workability." **Hobbs** and **Brown** impose a duty upon the Road Commission here to prove prejudice. In many instances, the government is placed in the unenviable, and at times impossible, position of proving a negative. The incident here allegedly occurred on February 6, 2001. Plaintiff gave untimely and inadequate notice on June 28, 2001. She failed to identify the exact location and nature of the defect. She identified the intersection in general and did not specify whether her injury resulted from a car accident or a trip and fall. She filed her lawsuit nearly two years after the incident and, for the first time, contended that her injury was caused by a water filled depression in the crosswalk. However, in July 2001, the intersection - including the crosswalk - had been resurfaced. Thus, at the time of the lawsuit, the Road Commission was required to harken back and attempt to discern the condition of the crosswalk two years earlier and prove that it was not defective so as to have caused Plaintiff's injury. Given

the untimely and vague notice given by Plaintiff, and the resurfacing done as scheduled in July 2001, it was impossible for the Defendant to do so. Instead of applying the statute as written and dismissing Plaintiff's action for failure to give timely and proper notice, or presuming prejudice, the lower court was bound to allow the case to proceed. This case provides a prime example of the lack of "practical workability" of the **Hobbs** and **Brown** precedent.

In considering the third factor in deciding whether stare decisis should apply, reliance interests would not work an undue hardship. In this case, "reliance" is considered in the context of erroneous statutory interpretation. In **Robinson**, and echoed again in **Pohutski**, this Court advised:

> [I]t is well to recall in discussing reliance, when dealing with an area of the law that is statutory, ... that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error. **Pohutski**, supra at 695, quoting **Robinson**, supra at 467-468.

Further, as Justice Corrigan noted in a concurring opinion in **Robinson**, "while too rapid a change in the law threatens judicial legitimacy, correcting past rulings that usurp legislative power

restores legitimacy." Id., at 472-473. Applying the above analysis to this case, even a cursory review of MCL 691.1404(1) instructs a citizen to give notice without providing a parachute for failing to do so. There should be no reliance on an "actual prejudice" requirement where the statute is devoid of any such language.

Finally, changes in the law no longer justify adhering to **Hobbs** and, therefore, **Brown**. As previously briefed, this Court's decision in **Ross**, supra, recognized the fundamental principle of governmental immunity: that it is expressed by the Legislature in the broadest possible sense, and that exceptions thereto must be narrowly construed. **Hobbs** pre-dated the landmark **Ross** decision and **Brown** simply fell in line with **Hobbs**. Both **Hobbs** and **Brown** fail to accede to a broad reading of immunity where they impose a showing by the government that is absent from the statute.

In sum, all of the factors to be considered in whether to apply stare decisis militate against perpetuating the errors of the past by way of **Hobbs** and **Brown**. As noted by this Court in **Wilson v Doehler-Jarvis**, supra at 514, and reiterated by Justice Riley in her dissent in **Brown**, "Notwithstanding ... the oft-discussed doctrine of stare decisis, this Court will not close its eyes to a possible error it may have committed in the past. We do not believe that the doctrine of stare decisis means that this Court and the evolution of the law should be controlled by the 'dead hand from the past.'" Id., at 373. **Hobbs** and **Brown** should be overruled, and MCL 691.1404(1) should be enforced as written.

II. A DECISION OVERRULING *HOBBS* AND *BROWN* SHOULD BE GIVEN RETROACTIVE EFFECT.

The general rule is that judicial decisions are given retroactive application. **Pohutski**, supra at 695; **Hyde v Univ. of Michigan Bd. of Regents**, 426 Mich 223, 240; 393 NW2d 847 (1986).

"Prospective application is a departure from this usual rule and is appropriate only in 'exigent circumstances.'" **Devillers v Auto Club Ins. Ass'n**, 473 Mich 562, 586; 702 NW2d 539 (2005). A threshold question in determining retroactive or prospective application is "whether the decision clearly established a new principle of law." **Pohutski**, at 696. Our courts then consider three additional factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. **Pohutski**, supra at 696.

In **Robinson**, this Court overruled prior case law that had interpreted "*the* proximate cause" in the governmental immunity statute, MCL 691.1407, to mean "*a* proximate cause." That decision was given full retroactive effect. This case is no different. Prior case law improperly engrafted a prejudice requirement onto MCL 691.1404(1) where none existed. As in **Robinson**, giving effect to the plain letter of the statute would not be establishing a "new principle" of law. It would be applying the statute as it has existed for years. "When a judicial decision 'does not announce a new rule of law, but rather returns our law to that which existed' before an improper extension, it should be applied retroactively." **Lasky v Realty Dev. Co.**, unpublished opinion per curiam of the Court of Appeals, issued April 27, 2006 (Docket No. 258125), **Exhibit 4**, citing **Wayne Co. v Hathcock**, 471 Mich 445, 484; 684 NW2d 765 (2004). Further, the purpose to be served by the new rule is to restore the legislative prerogative, enforce the statute as written, and apply governmental immunity in the broad sense as intended. Retroactive application would further this purpose.

As previously briefed, the "reliance" factor weighs in favor of retroactive application where the statutory language is clear and unambiguous - notice is required within 120 days and the claimant must specify the exact location and nature of the defect. Any citizen reviewing the statute would have known it was necessary to provide such notice, without regard to whether the government could

show prejudice. Further, this is unlike cases, such as **Pohutski**, where insurance decisions are made based upon precedent and the current status of the law. Prior to that case, municipalities had been deemed liable for trespass-nuisance claims in the form of sewer back-ups, and homeowners were thus discouraged from purchasing their own insurance policies. A change in the law with retroactive application would have undermined homeowners who had not purchased insurance in reliance on prior court decisions. No such concern exists in this case. Further, a claimant here would not forego giving notice, presaging or gambling that the government would not be able to establish prejudice. As such, there should be no reliance on an "actual prejudice" requirement to justify failing to give proper notice.

Finally, retroactive application would not upset the administration of justice. Claimants under the statute are explicitly directed to give notice. Those who have disregarded that directive have always run the risk that their claims would be dismissed. This scenario is distinct from that addressed in **Pohutski**. In that case, a statute was enacted to provide a remedy for sewer back-ups, albeit with numerous requirements and restrictions imposed. The Court there eliminated the common law trespass-nuisance exception to immunity as having been improvidently recognized in the first place. However, the Court applied its decision prospectively acknowledging that the Legislature had opted to provide a remedy, and prospective application of its judicial decision would allow for a smoother transition between the common law doctrine and the statutorily enacted rule. Again, no such scenario exists in the present case. Notice has always been required under MCL 691.1404(1). What was a possible consequence before, would now simply become a certainty.

In sum, if this Court overrules **Hobbs** and **Brown**, all of the factors to be considered in deciding between retroactive and prospective application clearly weigh in favor of retroactively

applying this decision.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for all of the foregoing reasons, amicus curiae, the Michigan Municipal Risk Management Authority, respectfully requests that this Honorable Court overrule **Hobbs** and **Brown**, and apply this decision retroactively.

Respectfully submitted,

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Dated: May 25, 2006